

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X
STEPHEN ELLIOTT, : 18-CV-5680 (LDH)
Plaintiff, :
-against- : United States Courthouse
MOIRA DONEGAN, and JANE DOES : Brooklyn, New York
(1-30), :
Defendants. : Friday, February 7, 2020
- - - - -X : 11:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE LASHANN DEARCY HALL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 Civil cause for oral argument Docket 18-CV-5680,
4 Elliott versus Donegan.

5 Counsel, please state your names for the record.

6 MR. LEWIS: For Mr. Stephen Elliott, Nicholas
7 Lewis of Nesenoff & Miltenberg. Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. KAPLAN: Roberta Kaplan, Your Honor, from
10 Kaplan, Hecker & Fink for Defendant Moira Donegan. And I'm
11 here with my colleague, Martha Fitzgerald.

12 THE COURT: Good morning to you all. You all can
13 be seated.

14 All right. So we are here this morning -- yeah,
15 we are here this morning for oral argument related to the
16 defendants' motion to dismiss. There appeared some
17 confusion related to the scope of the argument. I believe
18 that my order should have explained that it is narrowly
19 tailored to the very limited issue of Mr. Elliott's status
20 as a limited public figure.

21 I would like to first hear from the defendant, if
22 you could?

23 MS. KAPLAN: Sure, Your Honor.

24 THE COURT: All right. Thank you.

25 MS. KAPLAN: So, Your Honor, I'm going to be

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1 pretty brief because I think the answer here is pretty
2 clear. Obviously --

3 THE COURT: I do not think it is. That is why we
4 are here.

5 MS. KAPLAN: We'll see if I can convince you,
6 Your Honor.

7 THE COURT: All right.

8 MS. KAPLAN: Let's put it that way: So first of
9 all, the question of whether or not an individual like
10 Mr. Elliott is a limited public figure for -- limited
11 purpose public figure for purpose of First Amendment
12 analysis is certainly a question that the Court can decide.

13 THE COURT: Okay, you know, what? Let me stop for
14 a second. Absolutely.

15 There are a couple of threshold issues that you
16 all addressed in your -- I guess it would have been your
17 sur-sur reply, I think that is what it would have been,
18 concerning the propriety of the Court addressing this issue
19 whether or not Ms. Donegan had waived any arguments thereto.
20 Let me make it very clear: I do not believe Ms. Donegan
21 waived any arguments in this regard. That's one.

22 Two, I do believe that I have the ability to take
23 judicial notice of the materials that were attached to the
24 affidavit of one of the lawyers for the defendant in this
25 case. So the starting point for me is in light of the

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1 information I have, again, which I can take judicial notice
2 of, not for the truth of the matter asserted, but simply I
3 can take judicial notice of its existence and the contents
4 of the materials, and I can entertain this argument.

5 That should short-circuit some of this.

6 MS. KAPLAN: Absolutely, Your Honor.

7 THE COURT: Okay.

8 MS. KAPLAN: And I won't belabor that point.

9 And I will start by saying I don't even think,
10 honestly, Your Honor even needs those materials to make the
11 determination in this case. Because in the original
12 complaint in this action, specifically Paragraph 15,
13 Plaintiff alleged as follows: Quote, "Plaintiff is an
14 author living in New Orleans, Louisiana. He has published
15 multiple books and articles expressing his sexual
16 preferences. In these nonfiction works, of which the
17 defendants are aware, Plaintiff openly describes his sexual
18 preferences in detail." And here is the key language,
19 Your Honor. "So that it is clear that he could not
20 physically participate in the false, unsubstantiated
21 allegations published about him in the list by defendants."
22 End quote.

23 That paragraph, Your Honor, does not appear in the
24 amended complaint. But it was filed with this Court under
25 the standards of Rule 11, as any lawyer in any case has to

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1 do, and it states undisputed facts about who Plaintiff is,
2 what he's done as an author, the topics that he's written
3 about, and how, in his view, the topics he's written about
4 are squarely relevant to the allegations about what he's
5 accused of in terms of his defamation in this case.

6 And I want to go on to remind Your Honor that this
7 came up at the initial conference in the case back on
8 March 1, 2019. Your Honor said to Mr. Lewis, "I wanted to
9 go..." -- and this is on Page 10 of the transcript,
10 Your Honor -- "I wanted to kind of go in this order so that
11 we could now then get to the heart of it, which would be the
12 defamation claim. It doesn't seem to me, based on the
13 allegations in this complaint..." -- again, talking about
14 the original complaint -- "...that the parties are disputing
15 that the party in this case is a public figure. I think
16 that as I read the defendants' letter you argued that you've
17 met the standard necessary to proceed with the defamation
18 claim applying the standard as it would be against a public
19 figure. So I just want to make sure we're all operating on
20 the same sheet of music.

21 Mr. Lewis?

22 Yes, Your Honor.

23 We believe that it is the actual malice is
24 certainly met here and no discussion about public figure."

25 Now, whether or not it's a technical waiver,

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1 Your Honor, and there is argument on either side. If these
2 were statements made by counsel for the plaintiff in a
3 complaint filed pursuant to the Federal Rules, and what he's
4 talking about in that transcript is precisely the allegation
5 I just read to you.

6 So, as Your Honor has already concluded, I think
7 you absolutely have the ability to consider the articles
8 attached on the motion to dismiss. We're not asserting them
9 for the truth. We're asserting them for the fact that they
10 exist, and you can also consider them on a constitutional
11 fact doctrine, which is similar. But one argument here
12 would be you don't really need to because you have the
13 concession by plaintiff and his counsel in the first amended
14 complaint.

15 THE COURT: So let's assume that I don't assume
16 that there is a waiver, where are we?

17 MS. KAPLAN: So I think it doesn't matter because
18 it's a factual -- I'm not arguing it's a waiver of a legal
19 argument. What I'm saying is that it's a factual allegation
20 made by the plaintiff in the case under Rule 11, and in that
21 transcript he is basically agreeing that that allegation
22 pretty much takes care of the public figure analysis. If
23 Your Honor's following me?

24 THE COURT: I am following you. I am following
25 what you're saying.

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1 MS. KAPLAN: And I don't think it's fair or
2 permissible, not talking about legal arguments, but talking
3 about facts, for a plaintiff to file an amended complaint
4 and just take it out and say oops magic, no longer a public
5 figure.

6 THE COURT: So let's say he conceded at -- if I am
7 following your argument now, that he wrote extensively about
8 his sexual preferences.

9 MS. KAPLAN: Yes, Your Honor.

10 THE COURT: As I have had the opportunity to
11 review, I will confess certainly not -- I did not digest
12 Mr. Elliott's writings in total, but that it seemed as if
13 his writing, and I think in one of the articles that you
14 attached most recently, he's described as an S and M writer.
15 Right?

16 MS. KAPLAN: True, Your Honor.

17 THE COURT: His sexual preferences relates to
18 S and M. That's not the same thing as writing about rape
19 and sexual assault.

20 MS. KAPLAN: True, Your Honor. But his writings
21 are not limited to S and M.

22 THE COURT: Okay. Well --

23 MS. KAPLAN: In his writings, he talks about
24 issues of consent, issues of abuse, and to look at the
25 controversy, the public controversy about these issues as

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1 narrowly as defendant reposit, and I will go into that --

2 THE COURT: Right.

3 MS. KAPLAN: It's not --

4 THE COURT: And we can talk about that. And we
5 will talk about that because we do need to figure out what
6 the definition of the controversy is in this case and you
7 all have advanced your own versions of that controversy.

8 MS. KAPLAN: So I think --

9 THE COURT: But I want to be able to at least have
10 a starting point in terms of what and how it is that we are
11 characterizing his work.

12 MS. KAPLAN: So I think what I would say with
13 respect to that allegation in the first complaint is not
14 only that this is what he writes about, but that he believes
15 that that fact that he writes about is a complete -- is a
16 defense to the alleged defamatory statements made in this
17 case. So he's not only just saying --

18 THE COURT: Well, that is a foolish argument, but
19 I do not think that it goes to my analysis in terms of
20 whether or not he is a limited public purpose figure.

21 It is a silly argument.

22 MS. KAPLAN: Okay.

23 THE COURT: I think I said that back then.

24 MS. KAPLAN: I understand.

25 THE COURT: Yes.

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1 But go ahead.

2 MS. KAPLAN: So let me go to the legal standard on
3 this.

4 THE COURT: Thank you.

5 MS. KAPLAN: So the legal standard, as Your Honor
6 knows, it's a four-step analysis, four-part analysis.

7 One: Has the individual defendant successfully
8 invited public attention to his views in an effort to
9 influence others prior to the incident that is the subject
10 of this litigation;

11 Two: You know, has he voluntarily injected
12 himself into a public controversy related to the subject of
13 the litigation;

14 Three: Has he assumed a position of prominence in
15 the public controversy;

16 And four: Has he maintained regular community
17 access to the media?

18 With respect to 1 and 4, as Your Honor I'm sure is
19 aware, there is no dispute. The defendant concedes that
20 point.

21 So what we are really focusing on here are the
22 second and third elements.

23 THE COURT: Okay.

24 MS. KAPLAN: Okay? And let me start with the
25 second one.

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1 THE COURT: Thank you.

2 MS. KAPLAN: So unlike -- and the second one is
3 whether he voluntarily injected himself into a position of
4 commonance on these issues.

5 THE COURT: And now we have -- what is the issue?
6 What's the controversy?

7 MS. KAPLAN: So the controversy is the world of
8 'Me Too.' The world of sexual relationships between men and
9 women that are -- with or without consent, whether consent
10 is given, what kind of conduct is okay. What kind of
11 conduct is not okay. If you read anything about the world
12 of conduct of 'Me Too,' and I'm sure Your Honor has --

13 THE COURT: Yes, of course.

14 MS. KAPLAN: -- it's been a paradigmatic change as
15 in how our society looks at these issues, okay?

16 And the Second Circuit, Your Honor, in the *Lerman*
17 case, which is still good law, made it very, very clear in a
18 decision by Cardamone -- which I think is binding on you --
19 made it very clear that the controversy for these purposes
20 should be interpreted broadly, not narrowly, because of the
21 importance of the First Amendment protection.

22 THE COURT: Right. So I would not, I agree,
23 define the controversy in this case limited to the statement
24 itself, for example. Right? I'm not going to say that
25 whatever it is that Mr. Elliott is complaining about defines

1 controversy. But even if I were to define the controversy
2 broadly, and broadly in terms of 'Me Too,' I am not
3 altogether convinced that there is an overlap, as it were,
4 between a controversy that, perhaps, Mr. Elliott has
5 injected himself into and the controversy as it relates to
6 'Me Too.'

7 You know, you talk in your submission about his
8 writing. I'm looking for and looked for parts of his works
9 where he may be talking about experiences that relate to
10 issues of sexual harassment or misconduct in the workplace,
11 or more generally, which I think fairly encapsulates the
12 issues around 'Me Too,' right?

13 'Me Too,' as I understand it, and you will please
14 tell me if my characterization is an unfair one, was a
15 movement that began when a woman said, I believe that if we
16 have a chorus of voices that speak to the issue of sexual
17 harassment and sexual assault in the workplace, and more
18 generally, that chorus of voices will lend support to the
19 believability of these women when they make these
20 allegations because one voice versus a chorus of voices is
21 far stronger. And it will speak, and it has -- certainly it
22 hasn't been limited only to the believability of women. But
23 certainly it is specifically about, as I understand it,
24 issues related to sexual assault and sexual harassment as it
25 pertains mostly to women.

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1 MS. KAPLAN: Yes. So I would be broader than
2 that, Your Honor, so issues of sexual assault, sexual
3 harassment, the meaning of consent and how societal views on
4 that needed to change.

5 THE COURT: Right.

6 MS. KAPLAN: Based on sexist, and I would argue
7 misogynistic understandings of what constituted consent,
8 what constituted assault and what constituted --

9 THE COURT: Okay.

10 MS. KAPLAN: So here we have a defendant who
11 himself in his writing said that he was -- I don't know,
12 it's terrible. I felt terrible about it -- that he was a
13 victim of rape. He has written multiple times in his
14 writings in the context of S and M about what it means to
15 give consent or not to give consent in a sexual
16 relationship.

17 THE COURT: Direct me to that.

18 MS. KAPLAN: Yes, Your Honor.

19 THE COURT: I see in his writings where he talks
20 about his relationships, and there was one excerpt in
21 *The Adderall Diaries*, I believe it's at Page 137, where he
22 talks about his relationship with Patty. But it is not a --
23 what I have seen, and again, I am not an expert on
24 Mr. Elliott's writing, but what I have seen based on my
25 cursory review of his writing is where he talks about

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1 consensual sexual relationships perhaps ones that challenge
2 social norm, perhaps ones that to some are inappropriate,
3 somehow reprehensible, but nonetheless consensual in the
4 context of S and M.

5 MS. KAPLAN: Yes.

6 Well, first of all, let me refer you to the
7 article, and I'm going to take the next question. Let me
8 refer you to something I don't think we submitted in our
9 most recent submission. So the Salon article by Donna
10 Minkowitz, entitled, *The Softer Side of S and M* --

11 THE COURT: Yes.

12 MS. KAPLAN: -- talks about -- and I guess it's
13 Page 2 of the printout -- about sexual -- an S and M
14 encounter where someone was not asked for consent.

15 THE COURT: It says, "Without asking his consent,
16 preferences or anything," for instance, parenthesis, Take
17 your clothes off and put them in the corner is all she says.
18 She cuts his legs with a knife, threatening, burns him with
19 a cigarette, temporarily asphyxiates him."

20 This to me describes an S and M encounter. It
21 does not, to me, seem to overlap the issues of sexual
22 assault and sexual harassment that is the subject and the
23 target of this 'Me Too' movement.

24 MS. KAPLAN: So later in that article -- first of
25 all, I would respectfully disagree with Your Honor on that

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1 because I think issues of when someone gives consent and
2 when they don't, whether it's an S and M relationship or
3 it's an -- excuse my language, Your Honor, this case kinds
4 of causes language I wouldn't normally use in a court -- or
5 whether it's a Harvey Weinstein "grabbing your ass" in order
6 to get assignment, I think you are seeing a distinction
7 between those two things that is artificial.

8 THE COURT: Well, that --

9 MS. KAPLAN: Because the 'Me Too' in the types of
10 relationships says it's all part of the spectrum and whether
11 someone gives consent or not in any particular situation is
12 the key issue in the movement.

13 Moreover in that same article, he goes on to talk
14 about -- or the author goes on to talk about, spoke to him
15 about being raped when he was -- again, I feel horribly for
16 him -- but being raped as a child.

17 I apologize. There's not a printout, but that's
18 like four pages away from that.

19 And then in the other article that we submitted
20 most recently, Your Honor, and this is the Stephen Elliott
21 *Moods, Masochism and Murder*, which is really purports to be
22 an interview with Mr. Elliott, he says -- and this isn't
23 distinctly about S and M -- he says, "I'm still..." -- he is
24 talking about former girlfriends here. "I'm still on good
25 terms with all three of them, but we are not dating anymore.

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1 I think one of the problems with being in an open
2 relationship with multiple partners is that they're not
3 always deep enough, your lives don't fully intertwine."

4 He then talks -- later in the same, talking about
5 whether kissing someone is a political act. And he says,
6 "Actually, though, the instance really is political because
7 it was the woman who wanted to hook up with me, and she
8 thought she knew what I wanted but she had no idea what I
9 wanted. People think because you're masculine..."

10 THE COURT: I'm sorry, Ms. Kaplan, where are you
11 reading?

12 MS. KAPLAN: Oh, I'm sorry.

13 THE COURT: Just direct me to --

14 MS. KAPLAN: That's Page 4 of 12, Your Honor,
15 about a third of the way -- starting about halfway down the
16 page at the bottom.

17 THE COURT: Wait.

18 MS. KAPLAN: It's starting about halfway down the
19 page --

20 THE COURT: This is *The Softer Side of S and M*
21 article?

22 MS. KAPLAN: Correct, Your Honor -- no, no, this
23 is *Moods, Masochism and Murder*.

24 THE COURT: Okay.

25 MS. KAPLAN: I'm sorry.

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1 THE COURT: Okay. Wait a minute.

2 All right.

3 MS. KAPLAN: And I can hand it up if that would
4 help?

5 THE COURT: Okay. I have the *Stories of a*
6 *Troubled Man*.

7 MS. KAPLAN: And it's got an advertising at the
8 top.

9 THE COURT: Well, let's see...

10 MS. KAPLAN: May I approach, Your Honor?

11 THE COURT: Yes.

12 MS. KAPLAN: This is my copy.

13 THE COURT: Well, I'm certain I have it in here
14 somewhere.

15 Which exhibit number is it --

16 MS. KAPLAN: Just a moment --

17 THE COURT: -- do you know?

18 MS. KAPLAN: Just a moment, Your Honor.

19 MR. LEWIS: C.

20 THE COURT: It's C?

21 MR. LEWIS: Yes.

22 THE COURT: Thank you.

23 MS. KAPLAN: Are you there?

24 THE COURT: All right. Got it.

25 All right. Go ahead.

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1 MS. KAPLAN: So in this article, he's talking --
2 actually an interview, talking about issues of consent. I
3 don't -- I think your distinction, Your Honor, between
4 quote, S and M relationship and a regular relationship is a
5 distinction that in this context --

6 THE COURT: I don't think I said regular. But go
7 ahead.

8 MS. KAPLAN: In a non-S and M relationship, excuse
9 me, is a distinction that I don't think when you're talking
10 about issues like consent and whether or not someone wanted
11 or whether or not they didn't want it, I think that goes to
12 the heart of 'Me Too' and Time's Up and what is the public
13 controversy that is very much, you know, being discussed
14 today.

15 Similarly, Your Honor --

16 THE COURT: Well, I guess my distinction was that
17 as I viewed his writing, and I am not going to -- I am just
18 going to allow the plaintiff to characterize his writing
19 more fairly because, quite frankly, I do not want to speak
20 for Mr. Elliott -- but putting that aside, what I understood
21 his writing was largely about consensual S and M
22 relationships, by and large. And my concern is the notion
23 of conflating a consensual S and M relationship in any way
24 with circumstances where a woman is put in a position where,
25 without her consent, she is forced into a sexual dynamic.

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1 It is, in my mind, to conflate those two so diminishing to
2 the experience of women, that that troubles me.

3 MS. KAPLAN: Right. So I don't want to -- and let
4 me be crystal clear here. I don't want to conflate those
5 two things at all. I completely agree with Your Honor on
6 that.

7 What I'm saying, though, is that in his writings
8 often in the context of talking about S and M, one of the
9 topics that Mr. Elliott talks about over and over and over
10 again is the issue of consent. When it's given, how you
11 know it's given, what it means, et cetera. And I don't
12 think, Your Honor -- I am not conflating the two things, but
13 I do not think that that conversation has in the context of
14 S and M and taking place in the context of 'Me Too' and
15 Time's Up is very different. In fact, Your Honor, I think
16 it's the same conversation, they're just in different
17 contexts.

18 So I don't think that Mr. Elliott can come to this
19 Court and say, Yes, Your Honor I have spoken zillions of
20 times about what consent means in the context of the kinds
21 of relationships I've been in in my life. And when it's
22 clear and when it's not clear and when I thought the person
23 with me was doing something out of consent and when they
24 weren't.

25 But in this context, which talks about this list

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1 which purportedly were instances of Mr. Elliott -- and I'm
2 not -- this isn't about the truth of this hearing, but were
3 instances, allegedly, of Mr. Elliott doing things without
4 consent, you know, that is completely different. Because in
5 that context, no one said it was S and M. I think for
6 Your Honor to narrow the controversy that way would be, with
7 all respects, a legal error and I don't think the
8 Second Circuit, particularly in the *Lerman* case and
9 Judge Nap in the --

10 THE COURT: In the one --

11 MS. KAPLAN: -- *Adler* case saw the controversies
12 so narrow.

13 THE COURT: Right.

14 But in the *Lerman* case, we had a woman who, I
15 think, concededly asserted herself in the controversy of
16 sexual morals. She then published or was the producer of a
17 film that included an orgy scene; is that right? But she
18 was the producer of that film and she was accused of,
19 wrongly, of being the woman, the topless woman in the orgy
20 scene. I don't know if it requires an expansive view of the
21 controversy to be able to say that her -- the way in which
22 she viewed or spoke out about sexual norms and a film that
23 included an orgy scene about which she produced is
24 necessary. It doesn't require an expansive view. They seem
25 to be almost on top of each other.

1 MS. KAPLAN: But that's not what the
2 Second Circuit said, Your Honor, with respect.

3 What the Second Circuit said in *Lerman* is by
4 voluntarily devoting herself to the public's interest in
5 sexual morays, there are extensive writings on the subject,
6 which is exactly what Mr. Elliott has done here, no question
7 about that, leaving profits of wide notoriety for herself in
8 the progress, I don't know, you know, how big his profits
9 were, but also true here: "Ms. *Lerman* must be deemed to
10 have purposely surrendered part of what would otherwise have
11 been her protected technical privacy rights, at least those
12 related in some way to her involvement in writing her books
13 and screenplays."

14 The Second Circuit in *Lerman* does not use the
15 language that Your Honor is using. It uses expansive
16 language. And it reversed the District Court, Your Honor,
17 for doing exactly the kind of narrow constriction of the
18 controversy that the other side is proposing here.

19 Then the Second Circuit goes on and they're
20 criticizing the District Court's decision, which again, was
21 being reversed. And it says, "The District Court rejected
22 Defendant's argument that Ms. Lerman was a public figure for
23 the limited purpose of commenting on sex and nudity in
24 films." "The Court..." -- meaning the District Court --
25 "...reasoned that such a topic is merely a matter of incest,

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1 but not a true public controversy. We disagree.

2 The relationship between the sexes..." -- and here
3 is the key language --

4 THE COURT: Go ahead.

5 MS. KAPLAN: Here is money language, Your Honor.

6 THE COURT: I'm listening to you.

7 Go ahead.

8 MS. KAPLAN: "The relationship between the sexes
9 and public nudity are topics of continued and general public
10 interest and may be considered public controversies, even
11 though not involving political bait or criticism of public
12 officials. A public controversy is any topic upon which
13 sizable segments of society have different strongly held
14 views. Certainly various groups today have vastly divergent
15 views on propriety of female or male nudity in films and the
16 print media generally. In public controversies that daily
17 swirl about, be they politics, pocketbook issues, or, as
18 here, contemporary standards regarding nudity, some plunge
19 into the arena and enter the fray. Plaintiff is a
20 controversial, outspoken authoress and screenwriter
21 advocating equal --

22 THE COURT: We love it when a woman is called an
23 authoress, don't we?

24 MS. KAPLAN: I was going to -- I was going to --
25 about to comment, so this was written in 1984, Your Honor,

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1 and it --

2 THE COURT: It is apparent from the language --

3 MS. KAPLAN: It was from the year --

4 THE COURT: -- that is being used.

5 MS. KAPLAN: It was from the year, as I recall, I
6 graduated from high school.

7 But the holding of the decision remains, and this
8 was -- I am just going to say -- was written decades, many,
9 many decades before 'Me Too.' The same issue, the same
10 controversy, just like nudity in film was a big deal in
11 1984, today, Your Honor, the big deal in the public
12 controversy is the certain standards in which women and men
13 give consent and what that means.

14 THE COURT: I am just not -- I do not know if I am
15 as convinced as you are that his writings touch on that in
16 the way that you are describing it. I do not know if we
17 have a disagreement about the definition of the controversy
18 here -- well, let me rephrase that.

19 If you use 'Me Too' as a backdrop, I think that
20 you advanced four versions of what the controversy is in
21 your submissions in the most recent, in the sur-sur reply,
22 you say a larger issue is 'Me Too.' I think that that, at
23 least in my mind, more closely approximates what the public
24 controversy at issue in this case is. What I am trying to
25 decide is whether I agree with your viewpoint of his writing

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1 such that he can be said to have interjected himself into
2 that controversy. So we do not have much of a disagreement
3 about what the controversy is, I do not think. It is
4 broader than that which was advanced, I believe.

5 MS. KAPLAN: Understood, Your Honor.

6 THE COURT: I have made no determination so do not
7 quote me back and say you also say this was it, but the --
8 by the plaintiff, and I will note that the plaintiff does
9 look to the words of Ms. Donegan. But there is some
10 attraction to the defendants' argument that the controversy
11 here should be defined more broadly against the backdrop of
12 the 'Me Too' movement: That is an attractive argument for
13 me.

14 I'm trying to --

15 MS. KAPLAN: Right.

16 THE COURT: -- digest this man's writings to
17 discern whether I believe that there is the kind of
18 requisite intersection between his writings and that
19 controversy. That is what I'm struggling with, quite
20 honestly.

21 MS. KAPLAN: Understood.

22 THE COURT: What are *The Adderall Diaries*, what
23 are they talking about? You know, yes, I have read the
24 clips, I mean, the highlighted portions. I have read some
25 of this, you know, just as a specific readership and so it

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1 has taken me a minute to get through it, to be honest.

2 All right. With that said, I have a question for
3 you.

4 MS. KAPLAN: Sure.

5 THE COURT: In *Dilworth* and *Adler*, they both talk
6 about this. Where is the language from *Dilworth* I meant to
7 ask you. Hold on.

8 (Pause in proceedings.)

9 MS. KAPLAN: I apologize. I read *Adler*,
10 Your Honor, I apologize. So I'm not --

11 THE COURT: That's okay. In both *Dilworth* and
12 *Adler*, there is a suggestion in both cases, including in the
13 language that was cited by the defendant, about the audience
14 in terms of trying to discern the interjection of the
15 defendants' -- or the plaintiff's interjection, rather, of
16 themselves in a controversy. And in *Dilworth* the Court
17 says, "But anyone who publishes becomes a public figure in
18 the world bounded by the readership of the literature to
19 which he has contributed."

20 Which suggests that I should be looking to the
21 readership and whether the people who are the audience of
22 Mr. Elliott, are similar or the same as the audience of the
23 liable list statement.

24 In *Adler* it says, "Whether the person has
25 generated amidst controversy especially within the community

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1 to which the alleged liable was published."

2 Both of those are suggesting that I need to look
3 at the audience for both the statements that were made by
4 the defendant in the case, as well as the statements that
5 were made previously by the person who is purported to be a
6 limited purpose public figure.

7 MS. KAPLAN: Right.

8 THE COURT: All right. So where does that fall
9 here?

10 MS. KAPLAN: So I think, Your Honor, that we
11 are -- and let me just add to *Adler* what the Court says is
12 principally talking about we're not *Adler* and what she was
13 talking about was about her being fired from *Vanity Fair* and
14 then it defines the people very broadly, principally to
15 persons entrusted in literary matters. And that's why the
16 Court found a nexus in the *Adler* case, and that was a
17 Judge Nap decision.

18 Here, I think it's the same thing. We're
19 talking --

20 THE COURT: Well, in *Adler* she was a *Vanity Fair*
21 editor. It's a pretty large audience. And then in
22 *Dilworth*, we were talking about some mathematician; isn't
23 that right?

24 MS. KAPLAN: Yes.

25 THE COURT: And the person who criticized him

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1 called him a crank, so it was a more limited readership. I
2 do not know the appetite in the readership for Mr. Elliott's
3 work.

4 MS. KAPLAN: So I would say to you this: One, I
5 don't think -- *Dilworth* is not binding on Your Honor. It
6 was a case, I think, limited to the facts about a very
7 limited situation. The cases that are within the
8 Second Circuit I don't think look at it that narrowly in
9 terms of you actually look at the audience. It looks, as it
10 says in *Adler* and the same thing in *Lerman*, Your Honor,
11 about persons's interest in literary matters for *Adler*. In
12 *Lerman* people participating in the controversy then about
13 nudity in films. Those cases are on all fours with this,
14 Your Honor.

15 THE COURT: So just tell me what the answer is
16 here.

17 MS. KAPLAN: Right. So Mr. Elliott has spent much
18 of his career writing on issues of sexual relationships,
19 consent in sexual relationships, how consent is given or not
20 given in sexual relationships, and, of course, what all that
21 means.

22 Now, the --

23 THE COURT: The readership for that, for his works
24 would be defined to a --

25 MS. KAPLAN: Your Honor, I don't think you look at

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1 the readership. I don't think you look at the people who
2 buy his books.

3 THE COURT: Okay.

4 MS. KAPLAN: I think you look at the people who
5 are interested in those topics, and I think the people who
6 are talking about 'Me Too' are interested in those topics.
7 Just like in *Lerman*, you're not looking for people who only
8 watch nude films. That's not what the Court says in *Lerman*
9 case. It says that you are looking about -- or whether
10 there's an overlap in the public of people --

11 THE COURT: Right.

12 MS. KAPLAN: -- interested in those issues.

13 THE COURT: Well, that is what I am asking you.

14 MS. KAPLAN: Yes, Your Honor.

15 So there's no question that people, and some of
16 the women who are involved in 'Me Too' are not only
17 interested in talking about issues of consent in
18 relationships, but also in the same manner, -- they may look
19 at it differently than Mr. Elliott, but in the same manner
20 that Mr. Elliott does in his book and has been saying in his
21 books. So I really don't think that's even a close
22 question.

23 THE COURT: Okay.

24 MS. KAPLAN: On the issue of 'Me Too,' just to be
25 clear, Your Honor, I don't think he has to inject himself in

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1 the conversation officially denominated 'Me Too.' I think
2 the --

3 THE COURT: All right. We're using 'Me Too' as a
4 prompt --

5 MS. KAPLAN: Right.

6 THE COURT: -- for a larger issue.

7 MS. KAPLAN: Right.

8 THE COURT: It is the shorthand, is it not right
9 now.

10 MS. KAPLAN: Yeah. So what I think has happened
11 is he has injected himself in a conversation about matters
12 of consent and dominance and abuse in sexual relations.

13 THE COURT: Okay.

14 MS. KAPLAN: That's a topic that is the
15 centerpiece, really, the main theme of 'Me Too' and what
16 people are talking about.

17 THE COURT: Is that a main theme of his writing --

18 MS. KAPLAN: Yes.

19 THE COURT: -- matters of consent.

20 MS. KAPLAN: Absolutely. No question about it.

21 Let me read you another reference. This is from
22 *The Saddest Story I've Ever Read*, and he writes in that --
23 and let me give you the reference, Your Honor. "I was
24 writing a book about a man who equated abuse with
25 affection."

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1 Nothing could be more on all fours --

2 THE COURT: But that could be consensually
3 conflating abuse. I do not think that -- well, I'm sorry.
4 I do not see how that implicates consent.

5 MS. KAPLAN: Well --

6 THE COURT: Unfortunately there are people in this
7 world who sadly conflate abuse with affection and do so
8 consensually. I mean, it seems like the masochist here do
9 so. I'm not an expert.

10 MS. KAPLAN: Yeah, but again, Your Honor, I think
11 you're seeing it through a lens that's too narrow here. The
12 idea of whether -- between a man and a woman, whether you
13 call it S and M or anything else, whether consent is freely
14 given and whether -- whatever happens in that relationship
15 it -- has been -- is consensual and freely given between the
16 parties and non-abusive, is the central discussion --

17 THE COURT: Okay.

18 MS. KAPLAN: -- that we're having in 'Me Too.'

19 THE COURT: Yes --

20 MS. KAPLAN: And it's --

21 THE COURT: -- I agree with you.

22 MS. KAPLAN: -- and I don't think there's an
23 exception for S and M because by definition, anything in
24 S and M, by definition has to have consent.

25 THE COURT: I think you are misunderstanding my

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1 point because that is not what I said.

2 MS. KAPLAN: Okay.

3 THE COURT: What I am saying is, simply because a
4 person has chosen to conflate abuse and affection and make
5 them, for themselves, have chosen for themselves, does not
6 make it one and the same, does not make it nonconsensual.
7 It may not be the way in which I would perceive, right? I
8 may not perceive cutting as affection, but it appears to be
9 that there is a segment of the society that believes that
10 and engages in that consensually.

11 MS. KAPLAN: Yes. But what Mr. Elliott talks
12 about in this books is the circumstances in which consent is
13 given in that situation. Whether --

14 THE COURT: Or whether it is given?

15 MS. KAPLAN: Whether it's given, when it's given,
16 and how it's shown that it's given.

17 THE COURT: Okay. And again, I have not digested
18 all of these books, but it is those excerpts, it is pointing
19 me to where he is grappling with issues of consent as
20 opposed to talking about, you know, encounters that others
21 might deem abusive --

22 MS. KAPLAN: Well --

23 THE COURT: -- but that are occurring nonetheless
24 consensually.

25 What?

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1 MS. KAPLAN: Well, no. I'm just --

2 THE COURT: I would deem it personally abusive to
3 be cut. But if someone is engaging in that consensually,
4 consent is not the issue.

5 MS. KAPLAN: But the question and he writes
6 about this all the time -- and we can get you more
7 reference. The question is whether or not the person is
8 engaging in it consensually and how you know when the person
9 is engaging in it consensually is a central topic of his
10 writings, Your Honor.

11 THE COURT: Well, you will have to show me that,
12 Ms. Kaplan.

13 MS. KAPLAN: All right. Well, we're happy to put
14 in a post-argument submission. But there's just no question
15 that he writes about it.

16 He also writes about being raped, Your Honor, and
17 has sought to insert himself -- and again, I feel terrible
18 doing this because I feel horrible for Mr. Elliott -- but
19 has injected himself through his writings into the public
20 conversations about being raped, which is the core issue of
21 'Me Too' and Time's Up.

22 THE COURT: So if anyone ever wrote a story --
23 well, I'm just saying, if there was a woman who wrote a
24 story about being -- well, I guess, perhaps...

25 MS. KAPLAN: Yes, Your Honor, she would be a

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1 public figure.

2 THE COURT: She would be a public figure on that.

3 MS. KAPLAN: Exactly right. She would be a public
4 figure, a limited purpose public figure.

5 THE COURT: All right.

6 MS. KAPLAN: As in *Lerman* I'm not sitting around
7 arguing here is a general case.

8 THE COURT: And I don't think that you are.

9 All right. I'm listening if you have anything
10 else.

11 MS. KAPLAN: I'm just looking to see if there's
12 anything else, Your Honor.

13 (Pause in proceedings.)

14 MS. KAPLAN: I think Your Honor has already said
15 this, but one key error made by my friend on the other side
16 about that, is that the controversy that Mr. Elliott
17 injected himself does not have to be the controversy about
18 whether this list was a good idea. I think Your Honor has
19 already accepted that.

20 THE COURT: Yeah, Ms. Kaplan, I do not think he is
21 saying that, though. I think what he said is that the
22 controversy is as it was defined by Ms. Donegan in the cut
23 article.

24 MS. KAPLAN: He's saying giving rise to the list.
25 He says on Page 7 --

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1 THE COURT: Okay.

2 MS. KAPLAN: -- of the sur reply, giving rise to
3 the list. And I think Your Honor has already acknowledged
4 that that kind of a nexus is not required under any of the
5 Second Circuit cases.

6 THE COURT: Okay. Yes.

7 MS. KAPLAN: And I think with that, Your Honor, if
8 I could have a little bit of time for rebuttal, but thank
9 you.

10 THE COURT: You are up.

11 MR. LEWIS: Thank you, Your Honor.

12 Your Honor, regarding Mr. Elliott's writings, the
13 writings are universally about a male figure who is a
14 masochist in consensual relationships.

15 THE COURT: Well, Ms. Kaplan has proffered or said
16 that she will proffer me excerpts. But again, I have not
17 digested all of Mr. Elliott's works where the theme and the
18 question of consent is going to become evident. Are you
19 suggesting that that is not the case and that the question
20 of consent is not a topic about which Mr. Elliott's works
21 are written?

22 MR. LEWIS: That is -- yes, I think that
23 Ms. Kaplan was unable to pull a single reference to an
24 instance in which a character was being raped, sexually
25 assaulted.

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1 THE COURT: She did do a single reference. She
2 did do one for certain.

3 MR. LEWIS: And yet Your Honor noted it was a
4 consensual S and M relationship in the reference that she
5 noted.

6 But the --

7 THE COURT: Okay. Then let me ask you the
8 question the other way: Should Ms. Kaplan successfully
9 identify at least two instances, let's say, in Mr. Elliott's
10 works where indeed the question of consent is a subject,
11 does your argument then fall away? So is your argument
12 rests on the notion that the question of consent is wholly
13 absent from the works?

14 MR. LEWIS: No. Your Honor, my argument is that
15 the controversy as defined by Ms. Kaplan is exceedingly
16 broad and even relying on --

17 THE COURT: The controversy as defined by
18 Ms. Kaplan or as characterized as one attracted by
19 the Court? You should operate -- I gave a hint to you and
20 to Ms. Kaplan as to how it is that I think I am going to
21 view the controversy. So against that backdrop of that
22 really glaring hint, you should probably make your argument
23 for me.

24 MR. LEWIS: Well, Your Honor, I, of course, rely
25 on our earlier position about extraneous materials not

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1 being --

2 THE COURT: I've rejected that already.

3 MR. LEWIS: Okay.

4 THE COURT: So you should probably make an
5 argument that assumes that I am going to consider the
6 materials.

7 MR. LEWIS: Okay.

8 Well, I believe that it's not Ms. Kaplan who
9 should be defining the controversies.

10 THE COURT: Well, she is not defining the
11 controversy, I am defining the controversy. What I had said
12 was that that definition of the controversy as advanced by
13 Ms. Kaplan, you know, was one that was particularly
14 attractive to me and that fell against the backdrop of the
15 'Me Too' movement.

16 MR. LEWIS: And so Mr. Elliott's writings do not
17 focus on the nonconsensual rape, sexual harassment, sexual
18 assault. The focus that's on sexual matters is regarding
19 permissible consensual S and M relationships.

20 THE COURT: Yes. But to that extent -- my
21 question to you is if Ms. Kaplan is able to identify
22 instances in Mr. Elliott's writing where in the context of
23 an S and M relationship -- which was the argument that she
24 was making -- that in the context of an S and M relationship
25 he also speaks to the issue of consent in that context. And

1 if she is able to show me instances of that, how do I view,
2 then, his works in terms of his interjection into the
3 controversy?

4 MR. LEWIS: Well, I would say that he, one, not --
5 he's certainly not a prominent figure. Your Honor, asked
6 about readership.

7 THE COURT: Okay. He is not a prominent figure
8 where?

9 MR. LEWIS: Well, the test for limited purpose
10 public figure is not just that the plaintiff has voluntarily
11 injected himself into a public controversy related to the
12 subject of the litigation, but that he assumed a position of
13 prominence.

14 And, Your Honor, I certainly would posit to the
15 Court that that's never been a -- he's never assumed a
16 position of prominence, and if we're talking about general
17 matters of consent in any and all sexual relationships. I
18 don't -- Your Honor, as far as specific readings that
19 Ms. Kaplan might produce to you, I would have to probably
20 address them as they are produced. But I would submit that
21 Mr. Elliott certainly has not injected himself into any of
22 the controversies surrounding the 'Me Too' movement, however
23 it's defined. And all of the writings that I have looked
24 through were from a perspective of, consensual S and M
25 relationships. And I could speak to Mr. Elliott briefly if

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1 Your Honor would like just to -- I haven't memorized his
2 entire canons.

3 THE COURT: No. But you have got to imagine that
4 you believe that this was going to be an issue discussed
5 today?

6 MR. LEWIS: Sure.

7 THE COURT: No surprises here. You sent me a
8 letter of clarification about what we were talking about, I
9 narrowed it for you. So I would have expected that you
10 would have spoken to Mr. Elliott before you walked in here
11 today.

12 MR. LEWIS: So then I will have to see what
13 Ms. Kaplan sends. But I have not -- my position is he has
14 not inserted himself into controversy or the --

15 THE COURT: Related to consent.

16 MR. LEWIS: But --

17 THE COURT: I have a question for you. I'm going
18 to give you a hypothetical.

19 MR. LEWIS: Okay.

20 THE COURT: We've been bandying these issues
21 about, and came up with one.

22 So I'm going to read it just as is. Let's say
23 there's a very popular sex columnist who writes a column.
24 His column is called "Sex in the City," right? She recounts
25 her personal sexual escapades. Every week she describes her

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1 sexual encounters that she has had. A man comes out and
2 then accuses her of rape anonymously online. Would that sex
3 columnist be deemed a limited purpose public figure as you
4 view the world?

5 MR. LEWIS: No.

6 THE COURT: Why not?

7 MR. LEWIS: Well, she's writing about consensual
8 sexual interactions. And so under the theory that anyone
9 who writes about sex in general can then be thought of as
10 delving into whether there is consent, would mean that --

11 THE COURT: So she could -- only if she's ever
12 written about rape before specifically could she be deemed a
13 limited public figure, though she writes about sexual
14 encounters, implicitly suggesting that they were all
15 consensual and someone says actually that one she wrote
16 about last Thursday, she raped me, not a limited public
17 purpose figure in your mind?

18 MR. LEWIS: Well, if it was -- no, Your Honor, I
19 believe that that can't be the law.

20 THE COURT: Well, how do you square that with
21 *Lerman*?

22 MR. LEWIS: Well, in *Lerman*, Your Honor, the
23 writer first -- it's my understanding the writer was -- the
24 world famous Jackie Collins who --

25 THE COURT: This is the world famous Carrie

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1 Bradshaw.

2 MR. LEWIS: Right.

3 THE COURT: Everyone knows her.

4 MR. LEWIS: I'm familiar with her.

5 THE COURT: Okay. Go ahead.

6 MR. LEWIS: So the specific issue in *Lerman* as
7 Ms. Collins took position in, was she took a public stance
8 against women being nude in film less than men. And she
9 specifically --

10 THE COURT: I don't -- okay. I think it is turned
11 around, but go ahead.

12 MR. LEWIS: So the controversy, as I understood
13 the *Lerman* Court described as the debate over sex and nudity
14 in films.

15 THE COURT: Right.

16 MR. LEWIS: Where Ms. Collins specifically was a
17 proponent of equal nudes for all.

18 THE COURT: Right.

19 MR. LEWIS: So that is narrowly a tailored
20 controversy that Ms. Collins specifically took a position
21 in.

22 THE COURT: Okay.

23 MR. LEWIS: If Mr. Elliott or Ms. Bradshaw took a
24 public stance about whether, I guess, consent and sex, if
25 it's -- even in describing the topic I believe it's just too

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1 broad to try to --

2 THE COURT: Okay. Let's try this again.

3 MR. LEWIS: Okay.

4 THE COURT: Square it with *Adler*.

5 MR. LEWIS: Well, *Adler* also, as, Your Honor,

6 noted --

7 THE COURT: *Adler* defines the controversy in an
8 exceptionally broad terms.

9 MR. LEWIS: Well --

10 THE COURT: I'm reading from Page --

11 MR. LEWIS: One moment, Your Honor.

12 THE COURT: -- 1566 of *Adler*, the Court writes,
13 "The resurrection of *Vanity Fair* gave rise to a public
14 controversy into which Plaintiff injected herself in which
15 she played a prominent role. The revised *Vanity Fair*
16 received enormous publicity even prior to the publication of
17 its first issue. But offering her expertise and lending her
18 name to the magazine, Carrie Bradshaw, for prominent display
19 and its masthead under the title consulting editor in
20 exchange for not insignificant salary, Plaintiff represented
21 to the public that *Vanity Fair* would have the benefit of her
22 considerable expertise and excellent reputation. In doing
23 so she injected herself into the *Vanity Fair* saga and any
24 attendant controversy and any attendant controversy."

25 Wouldn't a controversy about whether Carrie

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1 Bradshaw's sexual escapade on Friday night was consensual or
2 not be an attendant controversy to her public discussions
3 concerning her sex life?

4 MR. LEWIS: Well, if so, if Ms. Bradshaw has this
5 readership similar to Jackie Collins, which is world
6 famous -- Your Honor, I believe asked Ms. Kaplan about the
7 audience. So we're talking about *Vanity Fair* is a
8 significantly larger audience, and if there's something
9 specific about --

10 THE COURT: You are not really answering my
11 question. If you do not have an answer to my question
12 then --

13 MR. LEWIS: Well --

14 THE COURT: Then you should answer it.

15 MR. LEWIS: Okay.

16 THE COURT: Okay? So why don't you try and answer
17 it.

18 So what I am asking you is, I think it is a
19 legitimate hypothetical, right? I think it is a
20 particularly legitimate hypothetical in light of the
21 argument that he only spoke about consensual sexual
22 relationships in the context of S and M encounters, whereas
23 Carrie Bradshaw only talks about consensual sexual
24 relationship.

25 MR. LEWIS: Your Honor, I'm sorry, and forgive me

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1 if I'm not grasping the hypothetical. The writing about
2 consent is different than just writing about the sexual
3 relationships, all of which are assumed to have a -- it's
4 not the same.

5 THE COURT: I am talking about the breadth -- the
6 scope of defining the controversy here, and I am using *Adler*
7 as the backdrop because the controversy is defined pretty
8 broadly and one's ability to interject themselves into the
9 controversy given its breadth seems to be a bar that is not
10 merely as high as that which is advocated by the plaintiff
11 in this case.

12 MR. LEWIS: Yes, Your Honor, I apologize. I was
13 looking for *Adler* so I can...

14 (Pause in proceedings.)

15 MR. LEWIS: Your Honor, if I might have the page
16 number that you're referencing?

17 THE COURT: 1566.

18 MR. LEWIS: Okay.

19 THE COURT: Similarly I think that Ms. Kaplan
20 identified the language in *Lerman*, which also was fairly
21 broadly defined the controversy in that case, one that seems
22 that if you aligned it, at least potentially, would make it
23 such that -- potentially could make it such that
24 Mr. Elliott's writings would be deemed to be an interjection
25 into the controversy fairly defined as one against the

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1 backdrop of the 'Me Too' movement. I just need you to --

2 Help me out here.

3 MR. LEWIS: Your Honor, so in distinguishing

4 *Lerman* --

5 THE COURT: Why should I not define the

6 controversies of *Adler*?

7 MR. LEWIS: Because anyone who was -- who wrote
8 about sex in any fashion could then be accused of being a
9 rapist and be considered a public figure, which and the
10 First Amendment would not protect for just -- it would be
11 open season on any writer who wrote about sex in any fashion
12 or any relationship where there was a loose connection to
13 whether consent was involved. And, Your Honor, I
14 respectfully submit that the Supreme Court has warned
15 against accepting these sort of *post hoc* arguments regarding
16 the scope of the public figure arguments. And obviously, I
17 was referred to *Walston* where that was -- people convicted
18 of crimes --

19 THE COURT: I'm sorry, forgive me.

20 MR. LEWIS: Oh, I'm sorry. *Walston* where the
21 Court ruled against open season for all who sought to defame
22 convicted criminals.

23 And so people who write about, not even
24 unconventional just any sexual desires, you know, if there
25 was a broad scope where anything where consent was involved,

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1 is permissible to be called a rapist, then it would be open
2 season and it would be an extensive reach of First Amendment
3 protection.

4 THE COURT: All right. I just want to make sure I
5 am clear about the distinctions that you are drawing.

6 MR. LEWIS: Yes, Your Honor.

7 THE COURT: All right. Are you saying that if a
8 writer does touch on consent, then potentially, yes, a
9 limited purpose public figure; but if a writer is simply
10 talking about sex but consent is not expressly written
11 about, then no, they do not fall into the category of a
12 limited purpose public figure; or is there a third that you
13 are --

14 MR. LEWIS: Well, so my answer would be no,
15 Your Honor.

16 THE COURT: No --

17 MR. LEWIS: Referring to *Lerman*, and I'm sorry for
18 the hypothetical, obviously. I don't want to misstate
19 anything. But my position -- the author in *Lerman*,
20 Jackie Collins, assumed a prominent position in the
21 controversy at issue and she wrote for millions of readers,
22 and so assuming a prominent position is also an element of
23 being considered a --

24 THE COURT: All right. Let's put prominence
25 aside for a moment.

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1 MR. LEWIS: Okay.

2 THE COURT: I am really just trying to talk about
3 the subject matter of his writing as it relates to the
4 controversy.

5 MR. LEWIS: Okay.

6 THE COURT: And so my question to you was, are you
7 suggesting that a writer who writes about sex but does not
8 expressly touch on the issue of consent, could not be
9 considered a limited purpose public figure for these
10 purposes, but, you know, that if they write expressly, if
11 their writing touches on the issue of consent, is it your
12 argument that they could be, or is there a third option that
13 I'm missing?

14 MR. LEWIS: Well, I think the -- yes, I would say
15 it is my position that there would be a third option. That
16 it is not just writing about consent once or twice.

17 THE COURT: Okay.

18 MR. LEWIS: If there was a writer, say,
19 Carrie Bradshaw was commenting on the 'Me Too' movement in
20 her articles, that would be placing herself in the consent
21 portion of the controversy you are referring to here,
22 Your Honor.

23 I don't believe just because a writer has touched
24 on consent once or twice that that would qualify the writer
25 to be --

1 THE COURT: In the *Adler* case, the plaintiff in
2 that case, didn't she do a little more than become an editor
3 for a magazine? I don't recall allegations where she
4 specifically addressed the vitality of *Vanity Fair* as a
5 magazine as a rag. She simply served as an editor. Does
6 that not undermine the argument that you are making here,
7 that there has to be an express statement explicitly
8 referencing what is identified as the controversy to allow
9 an individual to have injected themselves into that
10 controversy?

11 MR. LEWIS: Well, Your Honor, I believe there's
12 other matters in which someone can inject themselves into a
13 controversy beyond just their writing.

14 THE COURT: Okay.

15 MR. LEWIS: So I do believe that there needs to be
16 more than just --

17 THE COURT: Okay.

18 MR. LEWIS: -- if it's just writing about
19 relationships that could be tied to consent, I don't think
20 that that person can be considered a limited purpose public
21 figure on those writings alone.

22 THE COURT: Okay.

23 MR. LEWIS: I think they would have to insert
24 themselves into speaking about the -- in this case, the
25 'Me Too' movement more -- I will take away prominence, but

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1 they have to explicitly be dealing with that controversy,
2 Your Honor.

3 THE COURT: Okay.

4 All right. I'm listening.

5 MR. LEWIS: And, Your Honor, if I might just for
6 the record?

7 THE COURT: Please go ahead.

8 MR. LEWIS: The controversy that Ms. Kaplan has
9 stated in the complaint and Ms. Donegan's writing is focused
10 on is the problem of sexual assault, sexual harassment and
11 consent, specifically with women and women's issues in
12 reporting that sexual assault, rape.

13 THE COURT: I'm sorry. Can you please repeat
14 that, sir?

15 MR. LEWIS: Sure. The issues as discussed by
16 Ms. Donegan in her writing and noted in the complaint is
17 that her -- her focus is strictly on the issues of rape,
18 sexual assault, sexual harassment suffered by women and
19 the inability or the ineffectiveness of reporting that
20 sexual assault, rape, sexual harassment. So Mr. Elliott is
21 not here to take on the entire 'Me Too' movement. He's
22 writing his --

23 THE COURT: He's written about his own personal
24 sexual encounters, we can say that --

25 MR. LEWIS: Yes.

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1 THE COURT: -- right?

2 MR. LEWIS: And just that fact alone.

3 THE COURT: And the 'Me Too' movement, I just need
4 you to respond to it.

5 MR. LEWIS: Yes, Your Honor.

6 THE COURT: The 'Me Too' movement certainly
7 addresses personal sexual encounters and fairly broadly.
8 And then whether or not the encounters are consensual or
9 not; is that not touched upon in his writing?

10 MR. LEWIS: Well, he's writing about his personal
11 sexual encounters where there is consent, and it's a
12 permissible sexual act; and that just writing about that,
13 does not open him or any other writer, Ms. Bradshaw, or
14 otherwise to being -- you know, where anyone can accuse them
15 of rape.

16 THE COURT: Okay. Let's just be clear. The
17 question that we are answering is only whether he is a
18 limited purpose public figure.

19 MR. LEWIS: Sure.

20 THE COURT: So that I can then assess the standard
21 against which I should judge the pleadings, all right? It
22 is not --

23 MR. LEWIS: Yes.

24 THE COURT: -- a test of whether someone is
25 permitted to be defamed, right? There is still a defamation

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1 claim that may or may not lie depending on what the standard
2 is.

3 So I think your argument goes just a little bit
4 too far. We are trying to figure out what standard do I
5 employ in assessing a defamation claim.

6 All right. Go ahead.

7 MR. LEWIS: And, Your Honor, my position is that
8 the standard of having anyone who writes about their
9 personal sexual encounters and desires is not just
10 automatically considered a limited purpose --

11 THE COURT: Right.

12 MR. LEWIS: -- public figure.

13 THE COURT: But your argument ignores that there
14 are other elements, right? So I do not think that the
15 defendants here have suggested that simply anyone who writes
16 about their own sexual encounters becomes a limited purpose
17 public figure. Part of what the defendant did when they
18 stood up was say, Your Honor, there are only a couple of
19 elements that I believe are in dispute. But those are
20 elements, nonetheless, that would need to be satisfied which
21 would necessarily mean not everyone who writes about their
22 sexual encounters would be a limited purpose public figure.
23 Fair enough?

24 MR. LEWIS: Yes.

25 THE COURT: All right.

1 Is there anything else?

2 MR. LEWIS: Well, just that the -- and so one of
3 the elements that I submit is the defendant has not met
4 their burden of proof in establishing this, but aside from
5 the voluntary injecting himself into public controversy
6 related to the subject of litigation is also the -- assume
7 the position of public prominence in both *Adler* and *Lerman*,
8 there was certainly more of a prominence in the actual
9 controversy the Court determined.

10 THE COURT: Okay.

11 MR. LEWIS: And, Your Honor, also just if I might
12 be -- of course, I understand Your Honor's position
13 regarding the writings and the statements. And our position
14 is covered in our brief.

15 THE COURT: Right.

16 MR. LEWIS: But I just would like to add that
17 Ms. Kaplan when discussing the statements --

18 THE COURT: Which statements?

19 MR. LEWIS: About the statements that were in the
20 interview or even statements in the writing appeared to be
21 discussing them as true statements, the truth of the
22 statement.

23 THE COURT: What I understood Ms. Kaplan to say
24 expressly was to make a comment saying that they are not to
25 be accepted for the truth of the matter asserted. I think

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1 you made that statement. I know I certainly made that
2 statement. And I understand that you do not believe that I
3 should consider them. I am not -- and I said that I am.
4 But I am not clear on the basis for which I wouldn't
5 consider them. Is it something that you believe -- these
6 writings something that you do not believe that I could take
7 judicial notice of?

8 MR. LEWIS: No, Your Honor. But for this stage,
9 Your Honor, in particular the articles of which we were
10 given yesterday, noticed yesterday, I don't believe those
11 interviews or the answers can be considered as -- for in the
12 motion to dismiss phase.

13 THE COURT: Okay. Let's talk about
14 *The Adderall Diaries*.

15 MR. LEWIS: Yes.

16 THE COURT: Are you saying that I cannot take
17 judicial notice of *The Adderall Dairies*, which is a writing
18 by Mr. Elliott?

19 MR. LEWIS: The existence of it, of course you
20 can. That's what I understand Your Honor --

21 THE COURT: I don't need to believe that
22 Mr. Elliott actually had the word "possessed" carved into
23 his body. But I can take judicial notice of the fact that
24 he wrote that he had the word "possession" carved into his
25 body, correct?

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1 MR. LEWIS: Well --

2 THE COURT: That is the difference between taking
3 for the truth of the matter asserted and just simply taking
4 judicial notice of the writing itself. Do you see the
5 distinction?

6 MR. LEWIS: Yes, Your Honor.

7 THE COURT: Do you agree with the distinction that
8 I've made?

9 MR. LEWIS: Yes.

10 THE COURT: Okay.

11 All right. Go ahead.

12 MR. LEWIS: And I was just referring to some of
13 the arguments made by Ms. Kaplan which to me appear to be
14 more of arguing for the truth of what the statements are
15 about. Like the statement that he writes about regarding
16 consent.

17 THE COURT: Well, if he does, he does.

18 MR. LEWIS: Well --

19 THE COURT: That is something that I could take
20 judicial notice of. Whether in real life he did or did not
21 actually give consent, I cannot make a determination on.
22 That he wrote about consent would be appropriately a subject
23 on which I could take judicial notice.

24 MR. LEWIS: But you're referring to his writings.
25 I was referring to his statements by an interviewer saying

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1 he writes about consent. That is what I was referring to on
2 that.

3 THE COURT: Oh, you are saying the interviewer's
4 characterization of his writing?

5 MR. LEWIS: Yes.

6 THE COURT: Okay. That is a fair point. Now I am
7 following you.

8 MR. LEWIS: I'm sorry, Your Honor.

9 THE COURT: Do you believe that's a fair point,
10 Ms. Kaplan?

11 MS. KAPLAN: Yes.

12 THE COURT: Okay.

13 MS. KAPLAN: But I don't think that's what the
14 quote was. It wasn't talking about his writing. He was
15 talking about his own experience at that point. That's why
16 I was trying to be very solicitous toward that.

17 THE COURT: Look, I know what the ground rules
18 are.

19 MR. LEWIS: Of course.

20 THE COURT: And I'm going to follow those ground
21 rules.

22 MR. LEWIS: Of course.

23 THE COURT: So that is what we will do.

24 MR. LEWIS: Of course.

25 THE COURT: All right. Is there anything else you

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1 wanted to offer, sir?

2 MR. LEWIS: (No audible response.)

3 THE COURT: And so we are cleared up; you do not
4 have a basis to suggest that I cannot take judicial notice
5 of Mr. Elliott's writings? That is not your position or it
6 was, but you are not advancing that anymore?

7 MR. LEWIS: No. Just that what we're -- I rely
8 just on our briefs, Your Honor. It was more the -- what we
9 were referring to when the Court said what should be relied
10 upon and I rely upon all that.

11 THE COURT: Okay.

12 MR. LEWIS: And I would just ask, Your Honor, I
13 would be able to, of course, respond to whatever Ms. Kaplan
14 produces to Your Honor as far as writings?

15 THE COURT: Yes.

16 MR. LEWIS: Thank you. Thank you for your time,
17 Your Honor.

18 MS. KAPLAN: Your Honor, I'll be brief. So, of
19 course, we completely agree with Your Honor, that it's not
20 for the truth of what he has written about it. It is for
21 the fact that he has written about it.

22 I'm going to read a couple quotes to Your Honor,
23 and then we will provide a submission.

24 THE COURT: This is a lot of stuff.

25 MS. KAPLAN: Well, we'll read everything he's

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1 written over the course of however much time you give me and
2 we'll give you more quotes. But here's the quote that we
3 have handy.

4 THE COURT: Slowly. Read them slowly.

5 MS. KAPLAN: I'm so sorry. I'm terribly sorry.
6 Two things, one even though I'm from Cleveland, Ohio, which
7 makes me terribly embarrassed to read some of these things
8 and I apologize for that, everyone thinks I'm from New York
9 because I speak too quickly and so I'm going to try to slow
10 it down.

11 THE COURT: You have been here awhile.

12 MS. KAPLAN: I have been, most of my life,
13 Your Honor.

14 So here is a quote. "There was also Maria,
15 Justin's girlfriend and my first love who was beautiful and
16 tragic. Her grandmother had kept her locked in the closet
17 and sent her door to door begging for heroin money when she
18 was only 10 or 11 years old. She used to call me crying
19 saying that she had been masturbating with the vacuum
20 cleaner and she couldn't stop and her sides were all
21 bruised. Or she would tell me she had walked down to the
22 gas station at night in her underwear in heels. Everything
23 about her screamed 'rape me...' -- in quotes. I loved her,
24 but I didn't know what to do about it."

25 That's from *The Score*, Your Honor, and again, we

1 can get you the precise citation when we put in the written
2 submission.

3 Similarly, Your Honor, this comes from *The Saddest*
4 *Story I've Ever Read* from 2014: "Around this time, I went
5 to dinner with a woman, a sex worker, someone I used to
6 date, someone I dated briefly. I always date briefly and I
7 always date sex workers because they're the only ones who
8 understand desire without sex, real desire, raw and
9 unobtainable and without purpose, desire that ends there,
10 all consuming for nothing.

11 We ended up at the back of the restaurant called
12 Delphina, and I told her I was having money problems and
13 couldn't afford a fancy dinner. She said, Don't worry.
14 This particular woman had been raped by her father and one
15 time a client came to her. The client looked just like her
16 father. She tied the client to a wooden cross. She clamped
17 into his nipples and beat him until his back was bleeding.
18 The man begged to see her again but she refused, or
19 something like that. I told her I had dreams about my
20 father where I am holding his ears and screaming in his
21 face." And it goes on and on.

22 One more, Your Honor, this comes from -- I know
23 some of you have been reading *The Adderall Diaries*: "Patty
24 and I..." -- this is from Page 147 of our edition,
25 Your Honor -- "Patty and I didn't use safe words. We didn't

1 play safe, sane and consensually. She told me to call her
2 daddy and threatened to shave my head. Sometimes she hit me
3 when she was angry when we were just walking down the
4 street. Then she started taking pills for her anger and she
5 became someone else. I don't..." -- quote -- "'...I don't
6 know why I allow you to keep hurting me.' Patty says,
7 sitting next to me on the bed." And, again, it goes on and
8 on.

9 We will get you a full citation or a full
10 reference to all the citations. But I think it's
11 indisputable, Your Honor, at this point that the topic of
12 consent, whether it's consented and the topic of rape, which
13 goes to the heart of 'Me Too' and Time's Up, is something
14 that Mr. Elliott wrote about in his works.

15 With respect to the question of audience,
16 Your Honor, in the *Chicago Tribune* in 2005, Mr. Elliott was
17 called a rock star in literary circles. The readership of
18 the Shitty Media Men was exactly those circles. It was
19 directed to women in the media in literary worlds.

20 THE COURT: I'm sorry, what was that in the -- in
21 the *Chicago* --

22 MS. KAPLAN: -- *Tribune*. And we'll get you that
23 in our letter, 2005.

24 THE COURT: Okay.

25 MS. KAPLAN: Finally, Your Honor, unless

1 Your Honor has any further questions, I want to answer the
2 Carrie Bradshaw question. And I think the answer to that
3 question is certainly under *Lerman* and absolutely and
4 certainly a yes. Here is what again Judge Cardamone says
5 with no descents in the *Lerman* decision. And this, again,
6 has a kind of broad language Your Honor was referencing.
7 "By voluntarily devoting herself to the public interest and
8 sexual morays with extensive writing on this topic, reaping
9 profits, and wide notoriety for herself in the press,
10 Ms. Lerman must be deemed to have purposefully surrendered
11 part of what would otherwise have been her protectable
12 privacy of her rights, at least those related in some way to
13 her involvement in writing her books and screenplays."

14 Your Honor, with all respect, you can put in the
15 name Carrie Bradshaw into that paragraph or you could put in
16 the name of Mr. Elliott into that paragraph and the result
17 would be the same.

18 Again, you told us once to get you the submission
19 based on his writings and we will get it to Your Honor.

20 THE COURT: Go ahead.

21 MR. LEWIS: Thank you, Your Honor.

22 Your Honor, again, in *Lerman*, it was Jackie
23 Collins who wrote, "From what I understand, specifically
24 about sex..." And was an advocate of the equal nudes for
25 all and how women and men are not portrayed equally in films

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1 with regards to nudity. And the issue was regarding a nude
2 woman in a film, and so that is just to accept Ms. Kaplan's
3 argument is just basically anyone who writes about sex or
4 whoever mentions the word "rape" can then be accused of
5 being a rapist, which is just an appalling notion; and
6 anyone who writes about these subjects does not just open
7 themselves up of being accused of rape.

8 Thank you very much, Your Honor, for your time.

9 THE COURT: All right. I do --

10 MS. KAPLAN: Just to be crystal clear, Your Honor,
11 A, that's not my position, but it doesn't mean you can't be
12 sued for defamation. It means you have to show malice.

13 THE COURT: No, I already did that with plaintiff,
14 so I didn't figure we needed to go down that road again.

15 You understood my point when I said that to you,
16 right?

17 MR. LEWIS: Yes, of course, Your Honor.

18 THE COURT: All right.

19 Timing. Ms. Kaplan, I know you said when I asked
20 you to, I am curious what date you would offer?

21 MS. KAPLAN: I am leaving town Wednesday night,
22 Your Honor, and I would like to finish this before I leave.
23 So I'll be happy to submit it on Wednesday.

24 THE COURT: Well, that works.

25 MS. KAPLAN: Very well.

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1 THE COURT: All right. And then on Monday you'll
2 get me anything -- what day of the week is today?

3 MS. KAPLAN: Friday.

4 THE COURT: Okay, yeah.

5 So that -- Wednesday is what date?

6 THE COURTROOM DEPUTY: The 12th.

7 THE COURT: Of February.

8 THE COURTROOM DEPUTY: Yes.

9 THE COURT: So February 12th the defendant will
10 provide a supplemental submission related to Mr. Elliott's
11 work and the following Monday is when?

12 THE COURTROOM DEPUTY: February 17th.

13 THE COURT: February 17th the plaintiff will
14 provide a response, if any. Hum. I'm not going to give a
15 specific page limit because I want to see what it is that
16 you're identifying so...

17 MS. KAPLAN: Yeah, if it would be easier rather
18 than to do an argument, Your Honor, we can just provide --

19 THE COURT: I just want to know what was said.

20 MS. KAPLAN: We'll just give you the pages and the
21 quotes.

22 THE COURT: That's pretty much what I want.

23 To the extent you want to respond to what they
24 say, I mean, I'm not -- it is just what he said. If you
25 think that they've misquoted something, then you can

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1 identify that.

2 But it's not an argument submission so in terms of
3 responding, the response should be limited to identifying an
4 inaccuracy. Or if there is, much like a counter-designation
5 if there is something else that you would like to refer me
6 to, that's how I would like this to be treated, like a
7 deposition designation. This is not about argument.

8 Is that clear?

9 MS. KAPLAN: Understood.

10 THE COURT: Interesting stuff, folks. All right.

11 MS. KAPLAN: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. LEWIS: Thank you, Judge.

14 THE COURT: I really enjoyed hearing from you.

15 MS. KAPLAN: Thank you.

16 THE COURT: Okay.

17 (Matter concluded.)

18 --oo0oo--

19

20

21 *I (we) certify that the foregoing is a correct transcript*
22 *from the record of proceedings in the above-entitled matter.*

23 /s/ David R. Roy 10th Day of February,
24 DAVID R. ROY 2020 Date

25

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